IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 26 OF 2001.

Shri Pascoal Dias,
resident of Chavot,
Cortalim, Goa. ... Applicant.

Versus

1. The Assistant Collector
of Customs (P), New
Operational Building,
Major Bunder,
Vasco-da-Gama, Goa.
2. State (through Public
Prosecutor). ... Respondents.

Mr. S.G. Bhobe, Advocate for the Applicant.

Mr. M.S. Joshi, Additional Special Public Prosecutor
for the Respondents.

Coram: P.V. HARDAS, J.

Date: 17th July 2002.

ORAL JUDGMENT.

This revision has been filed by the applicant, who is convicted by the Chief Judicial Magistrate, South Goa, Margao, for an offence punishable under Section 135 of the Customs Act, 1962 read with Section 5 of Import and Export (Control) Act, 1947, in Customs Case No. 4/1987/A and sentenced to undergo rigorous imprisonment for 3 years and to pay fine of Rs. 500/- in default to undergo simple imprisonment for 30 days. The challenge to the conviction and sentence, as passed by the Chief Judicial Magistrate, South Goa, Margao, resulted in the dismissal of the appeal filed by the present applicant, by the IInd Additional Sessions Judge, South Goa,

Margao, by Judgment dated 30th August 2001, in Criminal Appeal No. 1 of 1994. The applicant being thus aggrieved, has filed the present Criminal Revision Application.

2. The brief facts necessary for the decision of this revision are stated hereunder:-

P.W.2 Shri K.D. Shridaran, a Preventive Officer, was on duty at the Dabolim Airport on 13th May 1987. The applicant/accused had arrived at the Dabolim Airport by domestic flight from Bombay. P.W.2 Shridaran noticed that the accused was moving in a suspicious manner. The applicant/accused was, therefore, intercepted while he was proceeding to the exit gate with his baggage. The personal search of the accused, which was taken in the presence of the panch witness P.W.4 S. Royan and another person, yielded the recovery of 4 gold biscuits of 10 tolas each wrapped with an adhesive tape on the sole of the left foot. Four gold biscuits of 10 tolas each and one gold biscuit of 50 gms. was found similarly taped by an adhesive tape on the right sole. It was found that all the gold biscuits were of foreign origin having a total weight of 850 grams and valued at Rs. 2,78,730/-. It appears that the applicant was unable to produce any documents to prove the legal import of the said gold.

The contraband gold was, therefore, seized under a panchanama dated 13th May 1987. The panchanama is at Exhibit P.W.2/A. The complaint, therefore, came to be filed against the present applicant before the trial Court. After conducting inquiry before framing of charge, the trial Court framed a charge against the applicant for an offence under Section 135 of the Customs Act. The applicant claimed to be tried and pleaded not guilty. The prosecution in support of its case examined 8 witnesses. The learned trial Court on appreciation of the evidence came to the conclusion that the prosecution was able to establish that 9 gold biscuits weighing 80 grams of foreign origin were recovered from the accused. According to the learned trial Court, the applicant/accused did not possess any legal documents to justify the possession of the said gold biscuits. The evidence on recovery of the gold biscuits coupled with the statement of the applicant recorded under Section 108 of the Customs Act, at Exhibit 24, proved the offence beyond reasonable doubt against the applicant. The learned trial Court, therefore, passed the aforesaid sentence.

3. The applicant being aggrieved by the conviction and sentence filed Criminal Appeal No. 1 of 1994. The said appeal came to be dismissed by the IInd Additional Sessions Judge, South Goa, Margao, by

Judgment dated 30th August 2001. The learned lower appellate Court held that the statement at Exhibit 24 of the applicant was a voluntary statement. The learned lower appellate Court on perusal of the statement at Exhibit 24 found that the applicant/accused had admitted that the gold was of foreign origin and he had concealed the same on the sole of his feet to avoid detection by the Customs Authorities. The learned lower appellate Court, therefore, found that the evidence tendered by the prosecution had established the offence beyond reasonable doubt and, therefore, confirmed the conviction and sentence and dismissed the appeal.

4. Mr. Bhobe, the learned counsel appearing for the applicant/accused has urged before me (1) despite the shifting of the burden of proof under Section 123 of the Customs Act, the prosecution is not absolved of its primary responsibility of proving that what was seized by P.W.2 Shridaran was gold. According to the learned counsel appearing for the applicant, the evidence on record does suggest that the prosecution had requisitioned the services of a goldsmith for ascertaining the purity of gold. However, according to the learned counsel for the applicant, the prosecution chose not to examine the said goldsmith nor was the goldsmith cited as a witness and, therefore, an adverse

inference has to be drawn against the prosecution, and (2) Section 102 of the Customs Act, 1962, is a provision which is para materia with Section 50 of the N.D.P.S. Act. The compliance of Section 102, therefore, is mandatory and in the absence of any evidence on record to suggest that the applicant/accused had been apprised of his right to be searched in the presence of either a Gazetted Officer or a Magistrate, the search and seizure is rendered illegal and no conviction could be based on such search and seizure.

5. Section 123 of the Customs Act reads as under:-

> "123. **Burden of proof in certain cases.--**[(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be --
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> (a) in a case where such seizure is made from the possession of any person,--
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> (i) on the person from whose possession the goods were seized; and
>
> (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also, on such other person;
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> (b) in any other case, on the person, if any who claims to be the

owner of the goods so seized.]

(2) This section shall apply to gold [and manufactures thereof], watches and any other class of goods which the Central Government may by notification in the Official Gazette specify."

6. A perusal of Section 123 of the Customs Act would show that where any goods, namely, gold, watches or any other class of goods which the Central Government may by notification in the Official Gazette specify, are seized under the Act in the reasonable belief that the said goods are smuggled goods, the burden of proving that they are not smuggled goods shall be (a) on the person from whose possession the seizure is made or if any person claims ownership of the said goods, the burden of proving is also shifted on the person in case he claims to be the owner of the goods so seized. It would thus appear that if the goods are seized in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods rests on the person specified in the said provision. Mr. Joshi, the learned counsel appearing for the respondents/complainants, has placed reliance on the Judgment in **Kewal Krishan v. State of Punjab,** A.I.R. 1967 S.C. 737. The Apex Court has observed as follows:-

" When goods are seized by the Customs Officer in the reasonable belief that they are smuggled goods then under S. 178A of the Sea Customs Act the onus of proving that

> they are not smuggled goods, that is, not of foreign origin on which duty is not paid, is on the person from whose possession the goods are seized. The onus is not on the prosecution to show that the goods are not of Indian origin."

7. Mr. Joshi has also placed reliance on the Judgment of the Apex Court in **Union of India v. Shyamsunder,** A.I.R. 1994 S.C. 485. The Apex Court has held that the persons from whom the contraband articles were seized had not satisfactorily discharged the burden of proof cast on them as required by Section 123 of the Customs Act that they are not smuggled. From the plain language of Section 123 and from the decisions of the Apex Court it is clear that if the goods are seized on a reasonable belief that they are smuggled goods, the burden of proof is shifted on the persons named in Section 123 to prove to the contrary.

8. Mr. Bhobe in support of his submission has invited my attention to the evidence of P.W.2 Shridaran. Curiously P.W.2 Shridaran is the seizing officer and he speaks about seizure of only 8 gold biscuits of 10 tolas each. Mr. Bhobe invited my attention to the following answer given by P.W.2 Shridaran in response to a question in the cross-examination: "I say that the biscuit are of pure gold because we have tested them. The Department had got the biscuit tested from the gold smith. I was not present at that time when it was tested nor do I know

the name of the goldsmith. One of the Officer had taken the biscuits for testing but I do not know his name. It is the concerned officer who had informed me. Whose names I do not know. His names will be on record."

9. Mr. Bhobe has urged on the basis of the abovequoted admission of P.W.2 Shridaran that this fact is not stated in the panchanama at Exhibit P.W.2/A. According to the learned counsel for the applicant, P.W.2 Shridaran has also not clarified as to when the gold biscuits were taken out for testing. Obviously, according to the learned counsel, the gold biscuits must have been taken to the goldsmith prior to sealing. There is no evidence, as per the submission of the learned counsel, that the gold biscuits were in the custody of any responsible officer and in fact the property before the Court is the same which was seized from the possession of the accused.

10. Mr. Bhobe has also invited my attention to the admission given by P.W.3 Sadhu Kusta Gawas, who, at the relevant time, was working as a Customs Guard. P.W.3 Gawas admits as follows: "One goldsmith was brought at the airport who weighed the biscuits and gave the value. I do not know who had called the said goldsmith and I do not know his name. Someone from the

customs had gone to call the goldsmith."

11. Mr. Bhobe also invited my attention to the admission of P.W.4 S. Royan, the panch witness, which is as follows:- "No other person came to verify whether the biscuits were genuinely of gold. No goldsmith came. I can say from appearance that they are genuine gold, but I am not an expert."

12. The submission of Mr. Bhobe that the prosecution has to establish that what was seized was gold before the burden is shifted on the accused to prove that they are not smuggled goods, needs consideration. Section 123 with all its rigour would apply only in the event the seizure is made in respect of the goods specified in Section 123. If the prosecution is able to establish that the seizure of the goods are as specified in Section 123 and the seizure is made in the reasonable belief that the goods are smuggled goods, the burden to prove to the contrary would then shift on the person from whose possession the goods are seized or other persons as specified in Section 123. The burden to prove to the contrary that the goods are not smuggled goods would not shift on the person until and unless the prosecution established the seizure of the goods which are specified in Section 123. In other words, Section 123 in its applicability

is restricted only to certain goods which are specified therein. The prosecution has, therefore, to initially prove the seizure in terms of Section 123 and it is thereafter that the burden to prove contrary would shift on the defence. In the present case it does appear from the evidence of P.W.2 Shridaran, P.W.3 Gawas and P.W.4 Royan that some efforts were made by the prosecution to procure the services of a goldsmith to test whether the biscuits purported to be of gold, were in fact of gold. If this is so, no reason is ascribed by the prosecution for withholding this evidence. There is also no mention that either the biscuits had been sent to the goldsmith or that the goldsmith had come to the scene of offence. This vital aspect of the prosecution case is completely shrouded in mystery and despite the examination of 8 witnesses the prosecution has not been able to clear the clouds of doubt, which hover over the prosecution. For shifting of burden under Section 123 and for eventual conviction under Section 135 of the Customs Act, it is sine quo non that the prosecution should establish that what was seized from the possession of the accused was contraband article within the meaning of Section 123. Section 135 prescribes certain minimum punishments and also prescribes an enhanced punishment in case the value exceeds Rs. 1 lakh. The Customs Officers have, therefore, to be all the more vigilant in adducing

evidence before a Court of law to substantiate the allegations which are made by them in the complaint. In the present case there is absolutely no evidence whatsoever that what was seized from the possession of the accused were gold biscuits.

13. Mr. Bhobe, the learned counsel for the applicant has relied on the Judgment of the learned Single Judge of the Karnataka High Court in **Central Excise Department, Bangalore v. P. Somasundaram**, 1980 Cri. L.J. 533 at paragraph 5, which reads as under:-

> "In the decision in Government of India v. Mohammed Issak ((1979) 2 Kant. LJ 19), Division Bench of this Court has held that the burden is on the prosecution to prove that what has been seized from the accused is gold and only on satisfactory proof of that fact, a presumption under Section 123 of the Customs Act would arise, and not otherwise. Even for the purpose of establishing the offence under Section 85(ii) of the Gold (Control) Act, 1968, the burden is on the prosecution to establish that what was seized is in fact gold. Thereafter the other considerations arise."

The mere bald assertion of the prosecution that what was seized were gold biscuits would not, in the absence of adequate proof, shift the burden under Section 123 on the accused.

14. Mr. Bhobe, the learned counselk appearing

for the applicant, has placed reliance on the Judgment of the learned Single Judge of this High Court in **Yusuf Suleman Hattia v. V.M. Doshi, Intelligence Officer, Narcotics Control Bureau, Bombay and another**, reported in 2001 (4) Mh.L.J. 76. The learned Single Judge of this Court has held that Section 102 of the Customs Act is mandatory and is pari materia with Section 50 of the N.D.P.S. Act. The search, seizure and arrest of the accused under the provisions of the Customs Act without apprising him of his right under Section 102 of the Customs Act would become suspect and the conviction based on such search and seizure under the provisions of the Customs Act is liable to be set aside. Mr. Bhobe has also placed reliance on **Banka Das and others v. State of Orissa**, 1993 Cri. L.J. 442. The Full Bench of the Orissa High Court has held that Section 102 of the Customs Act is pari materia with Section 50 of the N.D.P.S. Act.

15. Mr. Joshi, the learned counsel appearing for the respondents, has placed reliance on the Judgment of the learned Single Judge of the Madras High Court in **Abdul Wahib v. Assistant Commissioner of Customs (Prosecutor), Madras**, 1999 (113) E.L.T. 801 (Mad.). The learned Single Judge of the Madras High Court has held that Section 102 of the Customs Act is not in para materia with Section 50 of the N.D.P.S.

Act. The learned Single Judge of this High Court has taken a view that Section 102 of the Customs Act is para materia with Section 50 of the N.D.P.S. Act. The said Judgment of the learned Single Judge is binding on me and it is preferred to the Judgment of the learned Single Judge of the Madras High Court.

16. I have perused the evidence of the prosecution witnesses, the complaint and the panchanama and it appears that the right available to the accused under Section 102 of the Customs Act of being searched in the presence of either a Gazetted Officer or a Magistrate has not been informed to the accused. There are no averments in the evidence, in the complaint or in the panchanama that the accused was apprised of his right under Section 102 of the Customs Act. Section 102 of the Customs Act provides that in case the search and seizure is made in pursuance to the powers thereof conferred under Sections 100 and 101, the accused, if he so desires, may be produced before a Gazetted Officer or a Magistrate. The rigour of Section 102 and of Section 50 is identical. Admittedly, in this case P.W.2 Shridaran was exercising his powers of search and seizure under Section 101 of the Customs Act. The mandatory requirement of apprising the applicant/accused of his right under Section 102 has not been complied with. In the face of this

non-compliance of Section 102, the conviction and sentence passed against the applicant/accused is unsustainable.

17. Mr. Joshi, the learned counsel appearing for the respondents/complainants, has urged before me that the statement of the applicant/accused recorded under Section 108 of the Customs Act can be made the sole basis for conviction. Apart from the question about the voluntariness of the statement, a retracted confession can never be made the sole basis for conviction. Mr. Bhobe, the learned counsel appearing for the applicant/accused, has invited my attention to the Judgment of this Court in **Smt. Natalina Sanches v. Shri R.S. Gajjar**, 1998 (1) Goa L.T. 56. The learned Single Judge of this Court in paragraph 21 of the Judgment has held that in view of the endorsement which appeared at the foot of the statement a doubt had been raised regarding whether the statement had been made voluntarily. Mr. Bhobe, the learned counsel appearing for the applicant/accused, has also invited my attention to the endorsement alleged to have been made by the applicant/accused at the foot of his statement which is identical to the endorsement made at the foot of the statement in Natalina's case Supra. Apart from this, the proof that the statement was a voluntary statement had to be established by the prosecution at

the threshold. Even if it is held that the statement is a voluntary statement, since it has been retracted, it can be used to sustain a conviction provided it is corroborated by other independent evidence. In view of what I have held, there is no other independent evidence which would corroborate this statement of the applicant under Section 108 of the Customs Act. Thus, according to me, there is no legal evidence whatsoever to sustain the conviction of the applicant for an offence punishable under Section 135 of the Customs Act.

18. In the result, therefore, Criminal Revision Application is allowed. The conviction and sentence as passed on the applicant by the Chief Judicial Magistrate, South Goa, Margao, dated 15th December 1993 in Customs Case No. 4/1987/A and confirmed by the IInd Additional Sessions Judge, South Goa, Margao, in Criminal Appeal No. 1/1994, by Judgment Dated 30th August 2001 are hereby quashed and set aside and the applicant is acquitted of the aforesaid charge. The bail bond of the applicant stands cancelled. Fine, if paid, be refunded to the applicant.

(P.V. HARDAS)
JUDGE.

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